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Hon. Marc Barreca
Chapter 7
Hearing Date: Friday June 20, 2014
Hearing Time: 9:30 a.m.
Hearing Location: Seattle Courthouse

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re:

Michelle Catherine Merceri,

Debtor.

NO. 10-23826-MLB

**DEBTOR'S MOTION IN LIMINE TO
INCLUDE PURPORTED ATTORNEY
WORK PRODUCT AND PURPORTED
COMMON INTEREST DOCUMENTS**

Debtor Michelle Merceri ("Merceri"), by and through counsel, states:

1. INTRODUCTION AND RELIEF REQUESTED

Merceri seeks to admit e-mail messages between Defendant Matt Adamson ("Adamson") and Rory Livesey, attorney for Trustee Ron Brown, as evidence at the evidentiary hearing in this matter. Adamson agrees that at least some of the e-mail messages are not work product or common interest because he waived them, but challenges the scope of the waiver. He has stated he intends to request that the Court review the documents in camera when this motion is argued. Merceri only learned of these e-mails and the purported work product and common interest privileges at midday on Wednesday, June 19, 2014 and continued (unsuccessfully) to negotiate this issue until close of business Wednesday. Though this motion is unavoidably late, Adamson

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1 and Jones are not prejudiced, because the e-mail between the parties stated the basic facts and
2 law supporting Merceri's position stated in this motion *in limine*, and Adamson stated his
3 intention to argue this motion at the beginning of the hearing. *See* Fullmer Decl., Ex. A.
4 Additionally, Jones and Adamson could have provided this information on Friday, June 13, as
5 Adamson stated in a response brief that they were completed weeks ago.
6

7 2. FACTS

8 2.1. On or about February 14, Merceri filed her Motion for Contempt. In it, she
9 alleged that Adamson had "in an attempt to have her bankruptcy dismissed, contacted the trustee's
10 attorney Rory Livesey "Livesey" falsely alleging Merceri was attempting to "scam" and "defraud" the
11 trustee.¹ Dkt. 164 at 5. Her overall allegation was that Jones and Adamson had tried to get money
12 for the WSDOT proceeds, to which Jones is not entitled, and which was the subject of Adamson's
13 extrajudicial communications. *See generally* Dkt. 164.

14 2.2. Adamson filed the response on behalf of himself and Jones, which stated that he
15 contacted Livesey
16 to inform the trustee of estate assets that a debtor is hiding, and asking the
17 trustee about those assets.

18 2.3. Jones' Response, Dkt. # 170 at 17. Jones' response was supported by Adamson's
19 declaration and its exhibits (*see* Dkt. #170 at 17:9, attached hereto as **Exhibit 1**), which stated that he
20 had contacted Livesey

21 to disclose what I believed to be assets of the estate that were not listed on
22 debtor's scheduled and asked for the trustee's position on those assets. This
23 was an attempt to get the trustee's position on assets of the estate that might
24 be available to creditors. It was not an attempt to collect a debt from debtor.

25 ¹ As Adamson and Jones now know, Merceri and her attorneys did not know of the actual successful Fisher
26 litigation until post petition and well after the abandonment motion.

1 Adamson Declaration, Dkt. #171 at 6. Adamson's Exhibit 1 was his January 7, 2014 letter to
2 Livsey, in which he alleged that Merceri and her attorneys, and purported to ask Livesey
3 "whether it would be a violation of the automatic stay to pursue or collect any of those
4 proceeds." Dkt. #171-1, at 4.

5 1.1. Immediately after this Court's strong suggestion on March 7, 2014 that the parties
6 mediation the various disputes, Merceri requested and arranged mediation. The parties attended
7 mediation on April 2, 2014. The mediation was not successful.

8 1.2. On or about April 23, 2014, Merceri submitted discovery requests to Adamson
9 and Jones.²

10 1.3. On May 7, 2014, King County Superior Court judge Helen Halpert ordered the
11 parties back to mediation. Fullmer Decl., Ex. C, Clerk's Minutes, pg. 4.

12 1.4. In response, Adamson stated that the bankruptcy contempt motion was a barrier to
13 settlement.

14 1.5. That afternoon, Debtor's attorney Marc Stern ("Stern") offered to strike the
15 hearing. This Court's order requires both parties agree to continue the hearing. Adamson never
16 responded regarding the motion to strike and resisted all efforts to return to mediation.

17 1.6. On May 19, 2014, the Court issued a preliminary order again suggesting the
18 parties return to mediation.³

19 1.7. On May 22, 2014, believing the parties had agreed to withdraw the motion for
20 contempt, and after a direct question by Adamson, Stern withdrew his discovery requests. He
21 also stated that unless he heard otherwise, he would assume Adamson was withdrawing his
22 discovery request as well.

23
24 ² Merceri's attorney asked Adamson via e-mail if Jones' discovery requests should be sent to a different attorney.
Adamson replied that they should be sent to Adamson.

25 ³ Adamson preemptively drafted the preliminary order, and changed the Court's Order to a suggestion, which the
judge then signed.

1.8. Adamson then objected to the motion. In his response and in an attempt to get attorney's fees, Adamson stated that at the time the discovery requests were withdrawn, he had already completed the discovery responses.

1.9. At the hearing on the matter on June 13, 2014 Merceri withdrew her motion to withdraw the §524 action, and opted to go forward with the evidentiary hearing.

1.10. That afternoon, Merceri served Adamson and Jones with her discovery requests.

1.11. On Tuesday, June 17, 2014, the day motions *in limine* were due, Jones and Adamson served Merceri with their discovery requests. Neither Adamson nor Jones produced any documents, but claimed some kind of privilege for virtually every request.⁴ They did not produce any privilege logs.

1.12. Specifically with regard to a response regarding Adamson's communications with Rory Livesey, Adamson claimed work product privilege and common interest privilege.

1.13. After several e-mail exchanges, on Wednesday afternoon June 18, 2014, Adamson finally provided a privilege log for the communications with Rory Livesey, attorney for Trustee Ron Brown. Fullmer Decl., Ex. B, reproduced here in chronological order:

Document	Parties	Nature/Subject Matter
December 7, 9, 12, 2013 & January 3, 2014	Rory Livesey and Matt Adamson	WSDOT claim and whether trustee can pursue revocation of abandonment of Hunts Point property with attached case law and WSDOT letters
January 15, 2014	Rory Livesey and Matt Adamson	WSDOT claim as collateral for loan
March 8, 2014	Rory Livesey and Matt Adamson	Whether WSDOT claim runs with the land with case law
March 11, 2014	Rory Livesey and Matt Adamson	Identity of loan servicer
April 3, 2014	Rory Livesey and Matt Adamson	Statute of limitations for WSDOT Claim
April 14, 2014	Rory Livesey and Matt	Common Interest Privilege

⁴ Adamson stated he had some documents available for inspection and copying. When Ms. Fullmer stated she wanted to do so, Adamson then e-mailed a total of 12 pages of documents.

	Adamson	
April 23, 2014	Rory Livesey and Matt Adamson	Opposition to Merceri Motion re WSDOT claim with attached case law
May 5, 2014 emails	Rory Livesey and Matt Adamson	Adversary Proceeding Against Merceri et al re WSDOT

1.14. Adamson agrees that he and Jones waived the privilege, but he believes the scope of the waiver will be contested.

ISSUES

1. Did Adamson and Jones waive the work product and common interest privileges when they filed the January 7, 2014 letter to Livesey?

2. Are Adamson and Jones precluded from asserting a common interest privilege when Jones has no equity interest in the subject property and has not filed a proof of claim?

3. Are Adamson and Jones precluded from asserting the work product privilege when Adamson's communication with Jones was not part of his representation of Jones?

ARGUMENT

1. Adamson and Jones waived the work product and common interest privileges when they filed the January 7, 2014 letter to Livesey.

FRE 502 provides that a waiver of work-product applies:

a) When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

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1 *See also In re Circle K Corp.*, 199 B.R. 92, 100 (Bankr.S.D.N.Y.1996) ("The holder of the work
2 product privilege waives it only by voluntarily disclosing it in such a manner that it is likely to be
3 revealed to its adversary.") There is no question that the waiver was intentional and that it
4 revealed it to Merceri. Jones and Adamson filed the January 7 letter via ECF in this Court in this
5 proceeding. The privilege log shows that the subject of the undisclosed e-mails is the same as
6 the January 7 letter, i.e. hiding assets and the WSDOT proceeds. In fairness to Merceri, they
7 ought to be considered together.

8
9 **2. Jones and Adamson are precluded from asserting a common interest
10 privilege because when Jones has no equity interest in the subject property and has not
11 filed a proof of claim.**

12 The Ninth Circuit has long recognized that the joint defense privilege is "an extension of
13 the attorney-client privilege." *United States v. Henke*, 222 F.3d 633, 637 (9th Cir.2000); *see also*
14 *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir.1989) ("[t]he common interest privilege
15 "serves to protect the confidentiality of communications passing from one party to the attorney
16 for another party where a joint defense effort or strategy has been decided upon and undertaken
17 by the parties and their respective counsel.") The privilege is also referred to as the "common
18 interest" privilege or doctrine, and it applies whether the jointly interested persons are defendants
19 or plaintiffs. *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir.1990).

20 But Jones and the Trustee can not have a common interest. Jones agreed (finally) at trial
21 in the quiet title proceeding and that court found that the parties never intended for him to have
22 an equity interest in the subject Property, i.e. one that entitled him to equity or proceeds. This
23 negates any argument that Jones is entitled to the WSDOT proceeds.⁵

24 ⁵ Jones may continue to allege that his goal was to ensure Merceri and her attorneys do not "convert" the lender's
25 proceeds, and they get their due, but Adamson does not represent the lender, and their proposition is contradicted by
26 the deed of trust itself.

Further, neither Adamson nor Jones has alleged that the communications between Adamson and Livesey were statements Jones made to Adamson. *See United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir.2010) (party asserting the attorney-client privilege has the burden of establishing the existence of the relationship and the privileged nature of the communication). Further, pursuant to the privilege log, Jones and Livesey apparently did not discuss a comment interest until April 14, 2014. Jones and Adamson cannot belatedly invoke a privilege to hide their communications with Livesey.

Adamson and Jones waived the common interest privilege by filing the January 7 letter to Livesey with this Court. Livesey, who receives ECF notifications of filings, failed to object, and thus also waived the common interest privilege. *See United States v. BDO Seidman, LLP*, 492 F.3d 806, 817 (7th Cir.2007) (The " privileged status of communications falling within the common interest doctrine can be waived with the consent of all of the parties"); *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 556 (8th Cir.1990).

Pursuant to FRE 502, Merceri is entitled to undisclosed communications with the same subject matter, i.e. the e-mails between Adamson and Livesey.

3. Adamson and Jones are precluded from asserting the work product privilege because Adamson's communication with Jones was not part of his representation of Jones in the quiet title action.

Discovery in bankruptcy adversary proceedings is governed by the Federal Rules of Civil Procedure. See FED.R.BANKR.P. 7026-7037. Applicable to this controversy is Federal Rule of Civil Procedure 26(b)(1), which provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible

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1 at the trial if the information sought appears reasonably calculated to lead
2 to the discovery of admissible evidence

3 FED.R.CIV.P. 26(b)(1). Thus, the general rule is that litigants are entitled to discover
4 information that "appears reasonably calculated to lead to the discovery of admissible evidence."
5 Id. Ordinarily, a party may not discover documents and tangible things that are prepared in
6 anticipation of litigation or for trial by or for another party or its representative (including the
7 other party's attorney, consultant, surety, indemnitor, insurer, or agent)." FED.R.EVID. P.
8 26(b)(3)(A). Stated another way, materials produced in the ordinary course of business are not
9 protected work product. *Equity Residential v. Kendall Risk Mgmt., Inc.*, 246 F.R.D. 557, 564
10 (N.D.Ill.2007). Thus, a party asserting the privilege must establish work-product protection,
11 *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 152 F.R.D. 132, 137 (N.D.Ill.1993).

12 Adamson's February 28 declaration clearly states his purpose in contacting Livesey: to
13 report that Merceri and her attorneys were allegedly hiding assets. Adamson does not represent
14 Jones in the bankruptcy. Jones is not a creditor, so he would not be a party to any litigation by
15 the Trustee. Jones now asserts he agrees he is entitled to no equity and no proceeds, so the
16 communications were not related to the quiet title action. Jones and Adamson were, at best,
17 fomenters, and the e-mails were in the ordinary course of business. Thus, the communications
18 are not protected by attorney work product.

19 CONCLUSION

20 For the foregoing reasons, Adamson's communications with Livesey are not protected by
21 any privilege and may be admitted as evidence.

22 Dated this 19th day of June, 2014.

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